Supreme Court of the United States

OCTOBER TERM, 1913.

UNITED STATES OF AMERICA,
EX REL ALPHEUS H. BROWN,
Plaintiff in Error,

vs.

FRANKLIN K. LANE,
SECRETARY OF THE INTERIOR,
Defendant in Error.

} No.

To the Honorable,
The Supreme Court of the United States:

Your applicant, Alpheus H. Brown, respectfully makes application for the allowance of a writ of error to the Court of Appeals of the District of Columbia in the case known in that Court as United States of America, ex rel., Alpheus H. Brown, Appellant, vs. Franklin K. Lane, Secretary of the Interior, Appellee, No. 2531. The case was originally brought against Walter L. Fisher, Secretary of the Interior, but after he ceased to be Secretary of the Interior the Court directed the present Secretary of the Interior to be made a party in his stead.

The applicant was duly elected, qualified and entered upon his duties as a member of the Osage Tribal Council for the term of two years beginning July 1, 1912. The then Secretary of the Interior on January 2, 1913, passed an order removing the applicant and others as members of the Osage Tribal Council, without notice, without charges having been preferred and without opportunity to be heard.

The constitutionality of the said act of the Secretary of the Interior was brought in question in said Court and with-

in the meaning of Section 250 of "An Act to codify, revise and amend the laws relating to the judiciary. Approved March 3, 1911." It is in the following language:

"Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

* * * * * * *

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

* * * * * * *

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

That said act is within the meaning of paragraph "Third" of said Sec. 250 and involved the application of the Constitution of the United States as to whether said act was without due process of law within the Fifth Article of Amendments to said Constitution. The question was decided adversely to the applicant.

This case in said Court of Appeals drew in question the validity of an authority exercised under the United States by the Secretary of the Interior and also drew in question the scope of the power and duty of the Secretary of the Interior, an officer of the United States, within the purview of paragraph "Fifth" of said Sec. 250 of said act relating to the judiciary. The said questions were decided adversely to the applicant.

The defendant in error, appellee in the said Court of Ap-

peals, drew in question in said Court the construction of a law of the United States entitled "An Act for the Division of the Lands and Funds of the Indians in Oklahoma Territory and for other purposes." Approved June 28, 1906 (34 Stat., 539). It is within the class of cases referred to in paragraph "Sixth" of said Sec. 250. The said question was decided adversely to the applicant.

Sec. 9 of the said Act approved June 26, 1906, is as follows:

"That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year 1906, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of vacancy in the office of Principal Chief, by death, resignation or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined."

That on the 2nd day of June, 1913, the Court of Appeals of the District of Columbia entered a judgment in this cause in favor of the defendant and against this applicant affirming a judgment in said cause of the Supreme Court of the District of Columbia, overruling the demurrer of this applicant to the return of the defendant to the petition for a writ of mandamus and dismissing said petition of applicant in that Court for a writ of mandamus as therein prayed, in

which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this applicant, to wit:

1. In holding that the Respondent Walter L. Fisher, Secretary of the Interior, had authority of law to remove the Relator Alpheus H. Brown and other elected officers of the Osage tribe of Indians without giving notice to said Relator and other officers prior to such removal.

2. In holding that the Respondent Walter L. Fisher, Secretary of the Interior, had authority of law to remove the Relator, Alpheus H. Brown, and other elected officers of the Osage tribe of Indians without giving said Relator and other officers an opportunity to be heard in their defense prior to such removal.

3. In holding that the answer and return of the Respondent Walter L. Fisher, Secretary of the Interior, was a sufficient return to the rule to show cause.

4. In holding that the Respondent Walter L. Fisher, Secretary of the Interior, had authority of law by the arbitrary act of said Respondent set out in the petition and admitted in the answer to remove the Relator and other elected officers of the Osage tribe of Indians.

5. In overruling the demurrer of the Relator Alpheus H. Brown to the answer and return of the Respondent Walter L. Fisher, Secretary of the Interior, to the rule to show cause; in discharging said rule; and dismissing the petition of the Relator."

That the opnion of the Court of Appeals, in this cause. filed June 2, 1913, is, as follows:

"That these Osage Indians are wards of the nation must be kept in mind. The primary object of statutes affecting the Indian has even been his own protection and nowhere is the object more clearly discernable than in the act here under consideration. Without going into details, it may be observed that under section 3 oil and mineral leases may be

made by the tribe through its tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe. Under this section no mining of or prospecting for any minerals may be made without the written consent of the Secretary. Section 8 authorizes all deeds to said Osage lands to be executed by the Principal Chief of the tribe, no deed to be valid, however, until approved by the Secretary. While section 9, to which reference has already been made, authorizes the election of the officers therein named for a period of two years, that authorization is coupled with the condition that the Secretary may remove from the council any member or members 'for good cause, to be by him determined.' Having clothed the Secretary with supervisory control of the acts of those officers, it was but natural that Congress should specifically clothe him with authority to displace and supersede the officers themselves if, in his judgment, it should become necessary. That their right to hold office was subject at all time to the right of the Secretary to remove them, is too plain for argument. The only question is whether notice and hearing were prerequisites to the removal.

"In Eckloff vs. District of Columbia, 135 U. S., 240, 34 L. ed. 120, 10 Sup. Ct. Rep., 752, the Supreme Court gave expression to the rule that 'the grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice.' There authority was conferred upon the Commissioners of the District of Columbia 'to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office, and make appointments to any office under them authorized by law.' The court observed that the power to remove was a power without limitations, and hence that, in the absence of rules and regulations directing a different procedure, a summary dismissal thereunder could not be challenged. In Reagan vs. United States, 182 U. S., 419, 45 L. ed. 1162, 21 Sup. Ct. Rep., 842, the court said: 'The inquiry is therefore whether there were any causes of removal prescribed by law March 1, 1895, or at the time of the

removal. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.' Shurtleff vs. United States, 189 U. S., 311, 47 L. ed. 828, 23 Sup. Ct. Rep., 535, involved the question whether the President had power to remove from office a general appraiser of merchandise, without notice or hearing, when the statute under which he was appointed provided for his removal from office 'at any time for inefficiency, neglect of duty, or malfeasance in office. * * *'

"The court ruled that a removal for any of the causes authorized in the statute could be made only after notice and an opportunity to be heard, assumed that the removal was for causes other than those specified, and held that the action of the President was valid under his general power of removal. The court observed: 'The only restraint in cases such as this must consist in the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare.'

"In Re [illegible]ter, 141 Cal., 316, 74 Pac., 997, the court suggested that, in creating an office, the government may impose such limitations and conditions with respect to its duration and termination as may be deemed best; and that the incumbent takes the office subject to those limitations and conditions. In O'Dowd vs. Boston, 149 Mass., 443, 21 N. E. 949, it was ruled that under a statute providing that officers and boards of the city of Boston may remove their subordinates 'for such cause as they may deem sufficient and shall assign in their order for removal' a subordinate may be summarily removed without hearing upon assigning a cause in the order of removal. The court said: 'The language of the statute indicates that it did not intend to require charges and a hearing. It is not to be at the discretion of the board, for cause shown, which might have implied that there should be a hearing and adjudication, but it is to be for such cause

as the board shall deem sufficient, and this does not seem to contemplate a formal adjudication.' People ex rel, Gere vs. Whitlock, 92 N. Y., 191, involved the summary removal of a commissioner of police by the mayor of a city under a statute authorizing removal 'for any cause deemed sufficient to himself' (the mayor). The court sustained the removal upon the ground that the statute did not provide for a hearing, and that the question of sufficient cause was one for the mayor to decide. 'It may or may not exist,' said the court, 'except in his imagination, but his conclusion is final.' In State ex rel. Kennedy vs. McGarry, 21 Wis., 502, it was ruled that the grant of power to remove 'for incompetency, improper conduct, or other cause satisfactory to the board of supervisors, authorized such removal in an ex parte proceeding without notice or hearing to the person affected, providing only that the removal was for one of the causes specified, or other like cause. In other words, the court ruled that to give the supervisors jurisdiction, the removal must have been for one of the causes specified, but that the power to determine the existence of such a cause was vested exclusively in the board, whose decision upon the facts were beyond the review of the courts. Many other cases might be cited, but we do not deem it necessary.

"In the present case the statute prescribes that the removal shall be for good cause. If it stopped there, a different case would be presented; but, unfortunately for the appellant's contention, it does not. The determination of the question whether good cause exists is expressly vested in the Secretary, and this, we think, authorizes summary removal. This ruling is not only fully sustained by the cases previously cited, but it gives expression to the intent of Congress. The general provisions of this Act show that Congress was fearful that the valuable property rights of these Indians might be encroached upon by designing persons, and therefore imposed upon the Secretary of the Interior the duty of general supervision over the affairs of the tribe. While the tribe was authorized to elect officers, the acts of those officers

were to be carefully scrutinized by the Secretary, and if, at any time, he should become satisfied that good cause existed for the removal of those officers, or any of them, he was authorized to put his judgment into immediate execution. This was obviously in the interests of the tribe. As appellant accepted his office upon these conditions, he without standing here to complain that the Secretary has exercised the authority with which he is clothed by law."

The judgment of the Court of Appeals of the District of Columbia was entered June 2, 1913. On June 4, 1913, an application was made to that Court for allowance of a writ of error to the Supreme Court of the United States. That said application was denied on June 5, 1913, without comment.

The language of the Court of Appeals indicated that Congress intended to confer arbitrary power upon the Secretary of the Interior exercised in a most summary way. If such a construction of the statute is required by its language then it is submitted that he constitutionality of the law is involved.

The Supreme Court of the United States in the case of Garfield vs. Goldsby, 211 U. S., 249, 262, said:

"In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this Court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitution protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In the case of Choate vs. Trapp, 224 U. S., 675, it was held that Indians are not excepted from the protection guaranteed by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States.

In the case of Reagan vs. United States, 182 U. S., 419-425, the Supreme Court said:

"The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If it were not, the appointing power could remove at pleasure or for such causes as it deemed sufficient."

In delivering the opinion of the Court in the case of Shurtleff vs. United States, 189 U. S., 311, 314, Mr. Chief Justice Fuller quoted with approval the language used above from the Reagan case.

Section 454 of Mechem on Public Officers, is as follows:

"Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for

cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing; but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense."

It is respectfully submitted that the applicant is entitled to have his constitutional rights protected by the Supreme Court of the United States, and that his case falls clearly within the class of cases which may be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, this applicant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the error so complained of and that the transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Filed herewith are copies of the record in the said Court of Appeals and printed copies of briefs.

Respectfully submitted,

ALPHEUS H. BROWN,
By Andrew Wilson,
his attorney.

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By Andrew Wilson,
his attorney.

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OCTOBER TERM, 1913.

UNITED STATES OF AMERICA,
EX REL. ALPHEUS H. BROWN,
Plaintiff in Error,

vs.

FRANKLIN K. LANE,
SECRETARY OF THE INTERIOR,
Defendant in Error.

} No.

Brief of Plaintiff in Error in Support of Application for Allowance of Writ of Error.

Statement of the Case.

The Relator Alpheus H. Brown, the appellant here, filed his petition in the Supreme Court of the District of Columbia and prayed that a writ of mandamus be issued to Walter L. Fisher, Secretary of the Interior, commanding him as such Secretary of the Interior to revoke the order referred to in the petition as dated January 2, 1913, but stated in the return to the rule to be dated January 3, 1913, by which order the said Secretary of the Interior without notice and without any opportunity to be heard passed an order in the following terms:

"In Section 9 of the Act of Congress approved June 28, 1906, providing for the creation of the Osage Tribal Coun-

cil, it is provided that 'The Secretary of the Interior is hereby authorized to remove from the Council any member or members thereof for good cause to be by him determined.'

"By virtue of the authority thus vested in me I have determined that good cause exists for the removal of each and every member of said Council and Harry Kohpay, Me-ke-wah-ti-an-kah, A. H. Brown, Peh-tsa-moie, E-stah-ogre-she, W. S. Mathews, and Oscar A. Ririe are each hereby removed from membership in the Osage Tribal Council.

"It is not necessary that I should assign the reasons for this action, but in order that these reasons may be known by all of the members of the Osage Tribe and by all interested, I state as the reason for my action that the Osage Tribal Council as constituted prior to this order has shown by the things it has done and things it has failed to do that it has been controlled by influences hostile to the best interests of the tribe and the said Council and each member thereof has proven recreant to the duty owed to the tribe by the said Council and its members. It has permitted outsiders (some of whom have financial interest in the matters involved) to influence its policies and its actions contrary to the interests of the tribe and in matters of the greatest importance to the tribe. It has refused to follow the express wishes of the majority of the adult male members of the tribe that the bids made on the 11th day of November, 1912, for leases on the oil and gas deposits belonging to the tribe be accepted and that leases be executed thereon. It has persisted in attempting to have these deposits leased on terms, and in a manner definitely disapproved by the Secretary of the Interior, whose action in this matter has been sustained by the President of the United States after a hearing given to parties interested in securing such leases. It has failed to take any step to fill the vacancy in the office of Principal Chief caused by the removal of Bacon Rind, or the vacancy in the office of Assistant Chief caused by the removal of Henry Red Eagle, or the vacancy in the membership of the Tribal Council caused by the removal of Thomas West. It

has even failed to provide any method of filling vacancies in the Tribal Council and this failure compels me to take the necessary steps for this purpose..

WALTER L. FISHER, *Secretary.*"

The Relator claimed that this act on the part of the Secretary was unlawful.

In his petition the Relator alleged that Section 9 of the Act of Congress approved June 28, 1906, is as follows:

"That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year 1906, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of vacancy in the office of Principal Chief, by death, resignation or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined." (34 Stat. L., 545.)

It is further alleged that in pursuance of said act on the first Monday in June, 1912, a biennial tribal election was duly held at which Bacon Rind, a member of said Osage tribe of Indians, and eligible to the office of Principal Chief, was duly elected Principal Chief of the said Osage tribe of Indians for a term of two years beginning July 1, 1912; that at the same time Henry Red Eagle, who had theretofore been Assistant Principal Chief and who was eligible to that office

was duly elected Assistant Principal Chief for a term of two years beginning July 1, 1912; that at the same time the eight members of the Osage tribal council provided for in said statute were also elected as follows: Henry Kohpay, Me-ke-wah-ti-kah, the petitioner Alpheus H. Brown by the name A. H. Brown, Peh-tsa-moie, E-stah-ogre-she, W. S. Mathews, Oscar A. Ririe and Thomas West, all of whom were eligible and were duly elected members of the Osage tribal council for a term of two years beginning July 1, 1912; that all of said officers accepted the said offices to which they were severally elected and upon the first day of July, 1912, the said persons and each of them duly qualified and entered upon the discharge of their duties as such officers and from thence hitherto became and were and are now entitled to said offices and the emoluments thereof and are entitled to be carried upon the records of the Department of the Interior as such officers and to recognition by the respondent as Secretary of the Interior as such officers; that none of said persons have since died, resigned or become disqualified; and that each of said persons have faithfully performed the duties of his office for the best interests of th Osage Indians.

It is further alleged that prior to July 1, 1912, the said Fisher had informed Bacon Rind and Henry Red Eagle that they would not be recognized as principal chief and assistant principal chief, respectively; that said officers qualified and entered upon the discharge of their duties, but that the said Fisher passed an order attempting to remove them from their offices; that no notice and no opportunity to be heard was given to them.

It is averred that the Respondent was without authority to remove said persons from their respective offices and that the attempt to remove them was wholly void and inoperative, but that the order of removal is on the records of the office of the Respondent.

It is averred that the principal chief and assistant principal

chief are not now nor have they been members of the Osage Tribal Council.

That thereafter in July, 1912, the Respondent without notice and without opportunity to be heard wrongfully and unlawfully passed an order removing or attempting to remove Thomas West as a member of the Osage tribal council, which action on the part of the Respondent was beyond the power conferred upon him by law.

The petitioner averred that the Respondent without first giving notice to the persons named and giving them a reasonable time in which to be heard in their defense was without authority to remove members of the Osage tribal council and that said order is in violation of the rights of the said members of the said council secured by the Constitution and laws of the United States, in that said action was taken without due process of law.

It is further averred that the Respondent wrongfully and without authority of law has authorized and directed an election to take place to fill alleged vacancies in the office of Principal Chief, Assistant Principal Chief and eight members of the Osage tribal council, the said election to take place January 22, 1913, a copy of the said proclamation is filed as an exhibit to the petition. (R. 6 and 7.)

It is further averred that at the time of the filing of the petition there were no vacancies in the office referred to and that the members of the said Osage tribal council were and are without power or authority of law to fill the places referred to in said order of Respondent because vacancies did not and do not exist therein.

Petitioner further avers that in June, 1912, he was duly elected a member of the Osage tribal council for the term of two years beginning July 1, 1912, and that he is now of right a member of said council; that the acts of the Respondent hereinbefore referred to are wholly without warrant of law and the several orders hereinbefore referred to and particularly the said order of January 2, 1913, are in contravention of the rights and privileges of this Petitioner and each of the

officers therein named and such an order against him and them on the records of the Department of the Interior will cause him and them irreparable damage; that the said office to which this petitioner was elected and to which said other officers were elected and from which the Respondent has ordered his and their removal is and are valuable in that each of said offices carries with it a salary and honor and prestige; that the Petitioner and said other officers have not been guilty of any misfeasance or malfeasance in said offices and the causes assigned for the removal of Petitioner and other members of the Osage Tribal Council in the said order of January 2, 1913, did not on that date and do not in fact exist, and the Petitioner and the other members of the Osage Tribal Council have demeaned themselves properly and faithfully discharged their official duties.

It is further averred that petitoner and the said other officers have made demand upon the Respondent as Secretary of the Interior that he revoke said order and strike it from the records and strike out and remove his and their names from the said arbitrary and illegal order passed by said Respondent and to restore the name of your Petitioner and the names of said other officers on the records of the Department of Interior as members of the Osage Tribal Council and to recognize your Petitioner and said other officers as members of said Osage Tribal Council; that the said Respondent as Secretary of the Interior on the 15th day of January, 1913, did refuse to revoke said order, did refuse to strike your Petitioner's name and the names of said other officers therefrom and refused to recognize your Petitioner and said other officers as members of the Osage Tribal Council and refused to restore your Petitioner's name and the names of said other officers on the records of the Department of Interior as members of said Osage Tribal Council.

Being without other adequate remedy a writ of mandamus was prayed.

Upon the filing of said petition a rule to show cause was issued January 18, 1913.

The Respondent on January 21, 1913, filed his return in which he admits that said Brown was elected a member of the Council of the Osage tribe of Indians as set forth in the petition, but denies that the said petitioner or the other persons described in paragraph 7 of the petition has performed the duties thereof for the best interests of the Osage Indians, or at all; it is denied that they have properly demeaned themselves or have faithfully discharged their duties. It is alleged that they were and have been guilty of non-feasance and malfeasance in the discharge of their duties as members of the said Council; and particularly in regard to certain oil and gas mining leases, improperly and wrongfully secured by a certain corporation known as the "Uncle Sam Oil Company" and by certain individuals, which said leases were executed by the Relator, then Principal Chief of said Osage Nation, on May 26, 1912, and were disapproved by the First Assistant Secretary of the Interior on June 14, 1912; that the action of said Council in and appertaining to said leases was such that a special investigation was ordered to be made; that the result of said investigation disclosed matters of such a character as to satisfy respondent that relator, as well as the other members of said Osage Council so removed by him, were improper persons to be or remain members of said Council; that the Respondent had placed the matter in the hands of the Attorney General of the United States and the latter had placed the same in the hands of the United States Attorney for the district having jurisdiction over the parties, including the relator, for determination as to whether the same should be submitted to the grand jury in and for said district. The Respondent deems it inconsistent with public interest to aver in detail the facts on whch he determined that cause existed for the removal of relator, and the said other members of said Council. He avers that pursuant to the authority in him vested by the

provisions of section 9 of the act of June 28, 1906, (34 Stat., 539), he determined on the third day of January, 1913, that just and good cause existed for the removal of relator and the other members named in his order, from membership in said tribal council and did then and there rightly and lawfully remove the relator and the members mentioned in paragraph 7 of the petition, as members of said Council; that to wit, on January 16, 1913, the President of the United States, on appeal in that behalf, taken by the members of said Council, and after hearing accorded them, approved the action taken by Respondent.

It is further averred that the subject-matter of this suit is now pending before a committee of Congress on the petition of said members of said Council.

Respondent suggests that Congress has plenary power and control over the Indian tribes and their property, and has conferred upon the Secretary of the Interior full and exclusive power to remove any member or members of the Osage tribal council for any good cause by him to be determined, and that his action in so doing is not subject to review or control by any court of law or equity.

To the return the petitioner filed a demurrer on the same day setting out among the matters of law to be argued on demurrer that the answer sets forth no sufficient reason for the issuance of the said order of January 2, 1913, removing petitioner and others from the Osage Tribal Council and striking his and their names from the records of the Department of the Interior as members of said Council and refusing to recognize petitioner as a member of the Osage Tribal Council, and no sufficient cause for issuing the said order for election January 22, 1913.

After argument by counsel the Court overruled the demurrer, discharged the rule to show cause and dismissed the petition and ordered that the defendant recover of the plaintiff his costs to be taxed by the Clerk.

From the judgment of the Supreme Court of the District of Columbia petitioner appealed to the Court of Appeals, and the following assignments of error were made:

1. In holding that the Respondent Walter L. Fisher, Secretary of the Interior, had authority of law to remove the Relator Alpheus H. Brown and other elected officers of the Osage tribe of Indians without giving notice to said Relator and other officers prior to such removal.

2. In holding that the Respondent Walter L. Fisher, Secretary of the Interior, had authority of law to remove the Relator Alpheus H. Brown and other elected officers of the Osage tribe of Indians without giving said Relator and other officers an opportunity to be heard in their defense prior to such removal.

3. In holding that the answer and return of the Respondent Walter L. Fisher, Secretary of the Interior, was a sufficient return to the rule to show cause.

4. In holding that the Respondent Walter L. Fisher, Secretary of the Interior, had authority of law by the arbitrary act of said Respondent set out in the petition and admitted in the answer to remove the Relator and other elected officers of the Osage tribe of Indians.

5. In overruling the demurrer of the Relator Alpheus H. Brown to the answer and return of the Respondent Walter L. Fisher, Secretary of the Interior to the rule to show cause; in discharging said rule, and dismissing the petition of the Relator.

Before hearng in the Court of Appeals the term of office of Walter L. Fisher expired and Franklin K. Lane was duly substituted upon the record in his stead.

In the opinion filed June 2, 1913 (40 App., D. C. 536), the Court of Appeals of the District of Columbia used the following language:

"That these Osage Indians are wards of the nation must be kept in mind. The primary object of statutes affecting the Indian has ever been his own protection, and nowhere is the object more clearly discernable than in the act here under consideration. Without going into details, it may be observed that under section 3 oil and mineral leases may be made by the tribe through its tribal council, but with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe. Under this section no mining of or prospecting for any minerals may be made without the written consent of the Secretary. Section 8 authorizes all deeds to said Osage lands to be executed by the Principal Chief of the tribe, no deed to be valid, however, until approved by the Secretary. While section 9, to which reference has already been made, authorizes the election of the officers therein named for a period of two years, that authorization is coupled with the condition that the Secretary may remove from the council any member or members 'for good cause, to be by him determined.' Having clothed the Secretary with supervisory control of the acts of those officers, it was but natural that Congress should specifically clothe him with authority to displace and supersede the officers themselves if, in his judgment, it should become necessary. That their right to hold office was subject at all time to the right of the Secretary to remove them, is too plain for argument. The only question is whether notice and hearing were prerequisites to the removal. * * *

"In the present case the statute prescribes that the removal shall be for good cause. If it stopped there, a different case would be presented; but, unfortunately for the appellant's contention, it does not. The determination of the question whether good cause exists is expressly vested in the Secretary and this, we think, authorizes summary removal. This rule is not only fully sustained by the cases previously cited, but it gives expression to the intent of Congress. The general provisions of this act show that Congress was fearful that the valuable property rights of

these Indians might be encroached upon by designing persons, and therefore imposed upon the Secretary of the Interior the duty of general supervision over the affairs of the tribe. While the tribe was authorized to elect officers, the acts of those officers were to be carefully scrutinized by the Secretary and if, at any time, he should become satisfied that good cause existed for the removal of these officers, or any of them, he was authorized to put his judgment into immediate execution. This was obviously in the interests of the tribe. As appellant accepted his office upon these conditions, he is without standing here to complain that the Secretary has exercised the authority with which he is clothed by law."

The constitutionality of the said act of the Secretary of the Interior was brought in question in the said Court and within the meaning of Section 250 of "An Act to codify, revise and amend the laws relating to the judiciary. Approved March 3, 1911," which is in the following language:

"SEC. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

* * * * * * *

"Third: In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

"Fourth: * * * * * *

"Fifth: In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"Sixth: In cases in which the construction of any law of the United States is drawn in question by the defendant."

That said act is within the meaning of paragraph "Third" of said Sec. 250 and involved the application of the Constitution of the United States as to whether said act was without due process of law within the Fifth Article of Amendments to said Constitution. The question was decided adversely to the applicant.

This case in said Court of Appeals drew in question the validity of an authority exercised under the United States by the Secretary of the Interior and also drew in question the scope of the power and duty of the Secretary of the Interior, an officer of the United States, within the purview of paragraph "Fifth" of said Sec. 250 of said act relating to the judiciary. The said questions were decided adversely to the applicant.

The defendant in error, appellee in the said Court of Appeals, drew in question in said Court the construction of a law of the United States entitled "An Act for the Division of the Lands and Funds of the Indians in Oklahoma Territory and for other purposes." Approved June 28, 1906 (34 Stat., 539), and is within the class of cases referred to in paragraph "Sixth" of said Sec. 250. The said question was decided adversely to the applicant.

OPPORTUNITY TO BE HEARD NECESSARY.

In a case of this kind power of removal can only be exercised when charges are made against the accused, after notice, with a reasonable opportunity to be heard by the officer or body having power to remove.

The Indians are entitled to have notice and be heard in their defense as well as other residents or citizens of the United States.

In the case of Choate vs. Trapp, 224 U. S., 677, it was held that Indians are not excepted from the protection guar-

anteed by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States.

In the Government's dealings with the Indians statutes should be liberally construed.

Thus May 13, 1912, in Choate vs. Trapp, 224 U. S., 675, Mr. Justice Lamar in delivering the opinion of the Court said: "The construction, instead of being strict, is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

"For example, in Kansas Indians, 5 Wall., 737, 760, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Mr. Justice Davis, in speaking for the court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice Marshall, who said that 'The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of susceptible of a more extending meaning.'"

Again, in Jones vs. Meehan, 175 U. S., 1, it was held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."

The members of the Osage Council and the other officers referred to in the petition were elected by the Osage Indians for a definite term and were not appointed by the Secretary of the Interior. The right to the offices became vested rights and therefore valuable rights. These could not be divested except by due process of law.

Mr. Justice Lamar speaking for the Court in the case of Turner vs. Fisher, 222 U. S., 204-208, said:

"When, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek Freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law." Garfield vs. Goldsby, 211 U. S., 249.

"Notice to the attorney for such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process." Roller vs. Holly, 176 U. S., 399, 409; Hagar vs. Reclamation Dist. 111 U. S., 701, 708; Iowa Central Railway Co., vs. Iowa, 160 U. S., 389, 393; Hovey vs. Elliott, 167 U. S., 409, 414.

In a case where the Secretary of the Interior claimed in making up the rolls of citizenship of the Five Civilized Tribes that the determination of such matters was within his exclusive judgment and discretion, he struck the names of certain persons from the rolls, and without notice and hearing struck off the name of one Goldsby. The latter applied for a writ of mandamus to restore his name to the rolls. The writ was issued. The Court of Appeals affirmed the judgment, Garfield vs. Goldsby, 30 App. D. C., 177, and the case was then taken to the Supreme Court of the United States, Garfield vs. Goldsby, 211 U. S., 249. Mr. Justice Day in delivering the opinion of the court said:

"In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court

in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitution protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In the case of Shurtleff vs. United States, 189 U. S., 311, 314, the Court in its opinion said:

"In speaking of causes of removal, Mr. Chief Justice Fuller said in that case" (referring to the case of Reagan vs. United States, 182 U. S., 419-425): "The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If it were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient."

Section 454 of Mechem on Public Officers, is as follows:

"Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of

authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing; but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense."

In the case of State, ex rel. Hitchcock vs. Hewitt, 16 L. R. A., 413-417, a number of authorities were carefully reviewed sustaining the contention of the appellant here.

In the case of State vs. St. Louis, 90 Mo. 19, 6 West. Rep. 464, the general rule as to removal of public officers is thus stated: "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal must be for cause, the power of removal can only be exercised when charges are made against the accused, and after notice, with a reasonable opportunity to be heard before the officer or body having power to remove." And again, in the same opinion, the Court says: "When the removal is not discretionary, but must be for a cause, as is the case here, and nothing is said as to the procedure, a specification of the charges, notice, and an opportunity to be heard are essential."

In the case of Hallgren vs. Campbell, 82 Mich. 255, 9 L. R. A., 410, the Court said: "We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officers he is entitled to notice and a chance to defend." Field vs. Com., 32 Pa., 478.

Under a statute authorizing the board of police to remove any officer or member of the department for cause, the court held that such power could not be exercised by the board without assigning a cause for such removal, and giving to

such officer or member an opportunity to be heard thereon. The court granted the mandamus restoring the petitioner to office, on the ground that "he was improperly removed, no hearing having been accorded him." Ham vs. Boston, 142 Mass., 90.

"In a recent case of Denver vs. Darrow, 13 Colo., 460, the court held that, where an alderman had been elected for two years and had qualified, the board of alderman, which by law was made the sole judge of the qualifications of its members, could not remove such incumbent from office, upon the ground of disqualification, without notice to him, and an opportunity afforded him to make defense against such charge." Hitchcock vs. Hewitt, 16 L. R. A., 417.

"The governor's power of removal can only be exercised upon charges which shall specify the particular acts, or neglect relied on to make out the cause alleged; and the officer sought to be removed must have notice of these charges and specific allegations, and reasonable notice for a hearing thereon, upon which he may produce proofs." Idem, quoting from Dullam vs. Willson, 53 Mich., 393.

"Removal for cause, of an officer, must be upon notice to him of the charges, and an opportunity must be given to him to be heard in his defense. Whether the power of removal may be vested in the governor, or is, in its nature executive or is judicial, so that it cannot be vested in him, is not decided." Biggs vs. McBride, 5 L. R. A., 115.

"Removal from office, by the governor at discretion and without cause are contrary to the policy of the law." Biggs vs. McBride, 5 L. R. A., 117.

"A person elected, and who has entered upon the discharge of his duties, as a school district officer, cannot be deprived of his office upon the ground that he has neglected or refused to perform any duty, required of him, without notice, and a

hearing before some competent officer or tribunal; and, until a forfeiture of his rights to the office has been ascertained and declared, the county superintendent has no authority to appoint another person in his stead." Jacques vs. Little, 20 L. R. A., 304.

"Municipal officers appointed for fixed periods are, in the absence of express authority to remove them without cause, entitled to hold their offices until the expiration of such periods unless removed therefrom for cause after a fair trial." Hallgren vs. Campbell, 9 L. R. A., 408.

"Unless an officer be elected and declared to hold during pleasure, the power of amotion as well as of disfranchisement ought to be exercised in a just and reasonable manner and upon due notice and opportunity to be heard." 2 Kent Com., p. 298; 9 L. R. A., 409.

"A statute providing for the removal from office of such an officer for inefficiency, incapacity, neglect of duty, or other cause; and which makes no provision for giving him notice, or for allowing him to be heard in his defense, is contrary to the constitutional guaranty which declared that no person shall be deprived of life, liberty, or property without due process of law." State vs. Hamilton, 1 L. R. A. (N. S.), 589.

"In Williams vs. Bagot, 3 Barn. & C., 785, Mr. Justice Bayley said: 'It is contrary to common justice that a party should be concluded unheard.'" "Capel vs. Child, 2 Cromp. & J., 558, is in the same line. The court said: 'A party has a right to be heard, for the purpose of explaining his conduct.'" State ex rel. Hitchcock vs. Hewitt, 16 L. R. A., 416.

"The Ramshay Case, 18 Q. B., 163, was one in which the Lord Chancellor undertook to summarily remove a judge of a county court under a statute authorizing him to make such removal for inability or misbehavior. The court, by

Lord Campbell, Ch. J., said: 'The Chancellor has authority to remove a judge of a county court only on the implied condition, prescribed by the principles of eternal justice, that he hears the party accused." State ex rel. Hitchcock vs. Hewitt, 16 L. R. A., 415.

"In Biggs vs. McBride, 17 Or., 640, 5 L. R. A., 115, the court declined to decide whether such power was judicial or executive, but said: 'It is believed under either view and by whomsoever the power of removal for cause may be exercised, it must be done on notice to the delinquent of the particular charges against him, and an opportunity given him to be heard in his defense.'"

"Dullam vs. Willson, 53 Mich., 392, 51 Am. Rep., 128, was a case where the governor undertook summarily to remove without notice one of the trustees of the state institution for educating the deaf and dumb, on the ground of official misconduct and habitual neglect of duty, as stated in a paper filed with Secretary of State, and served on such officer after such removal. A statute authorized the governor to remove certain officers, including the one involved, for 'official misconduct, or habitual or willful neglect of duty.' The Constitution of the State also imposed upon the governor the duty of examining into the condition and administration of public officers, and authorized him to remove any such officer for gross neglect of duty, of for corrupt conduct in office, or other misfeasance or malfeasance therein. The question was whether the governor had legally exercised the power of removal. While the court held that the power of determining whether any of the specified causes of removal existed or not was judicial in its nature, still such power properly belonged to and might be exercised by the governor because expressly conferred upon him by the Constitution; but it was further distinctly held that such power could not be properly exercised without notice to the officer to be proceeded against, and an opportunity given him to be heard in his defense. The court said: 'Unless it is the manifest

intention of the section under consideration that the proceedings should be *ex parte*, as well as summary, a removal without charges, notice, and an opportunity for defense could not be upheld. * * * The officer is entitled to know the particular acts and neglect of duty, or corrupt conduct, or other acts relied upon as constituting malfeasance or misfeasance in office. And he is entitled to a reasonable notice and of the place and time when an opportunity will be given him for a hearing, and he has a right to produce proof on such hearing.'" State ex rel. Hitchcock vs. Hewitt, 16 L. R. A., 417.

"In the early case of Page vs. Hardin, 8 B. Mon, 648, where the governor of Kentucky undertook to decide that the Secretary of State had abandoned his office, the tenure of which was good behavior during the term for which he was appointed, and commissioned another person in his place, no notice was given to Hardin, the incumbent, previous to the action of the governor. *Chief Justice* Marshall, in delivering the opinion of the court, said: 'The secretary being removable for breach of good behavior only, the ascertainment of the beach must precede the removal. In other words, the officer must be convicted of misbehavior in office, and we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good name and standing, implies a charge, and trial and judgment, with the opportunity of defense and proof." State ex rel. Hitchcock vs. Hewitt, 16 L. R. A., 416.

"In Com. vs. Slifer, 25 Pa., 23, 64 Am. Dec., 680, an adjutant-general had been appointed for a specified term, subject, however, to a statute providing that 'Whenever in the opinion of the governor, the adjutant-general fails and neglects faithfully perform the duties of his office, the governor shall remove him from office.' The governor appointed another to the office and this action was an application by the first appointee for a mandamus to compel

payment of his salary. No notice was given to him of any claimed neglect of duty prior to the appointment of his successor, and the court said: 'We are unwilling to believe the governor intended without cause to remove an officer appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded, but the power is to be exercised upon cause shown. It exists only where the officer 'fails and neglects faithfully to preform the duties of his office.' It is true that the executive is made the judge, and that his opinion or judgment is conclusive as far as relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense. The reputation and the right of the incumbent to the office for the term specified in his commission are involved and he has a right to know the accusation, and to be heard in his defense." State ex rel. Hitchcock vs. Hewitt, 16 L. R. A., 416.

Where the statute prescribes no preliminary proceedings but authorzes a removal "for cause" there must be a notice and hearing and in such cases the proceeding is judicial. State vs. Donovan, 89 Me., 451; Andrews vs. Board, 94 Me., 76; State vs. Walbridge, 119 Mo., 383; McGregor vs. Supervisors, 37 Mich., 389; Merrick vs. Board, 41 Mich., 630; Haden vs. Memphis, 100 Tenn., 582; State vs. Council, 53 Minn., 242; Markley vs. Cape May, 55 N. J. Law, 105.

The case of State vs. Council, 53 Minn., above cited is a strong case and especially so in reference to what constitutes sufficient cause, and holds that sufficient cause means a legal cause and not merely any cause which the removing power might think sufficient. It holds that the cause must be one which specially relates to and affects the administration of the office and must be restricted to something of a substantial matter directly affecting the right and interest of the public. The cause must be one touching the qualifications of the

officer or his performance of its duties, showing that he is not fit or proper person to hold the office. The court says that an attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office and the qualifications necessary to fill it. Bagg's Case, 11 Coke, 93b ; Rex vs. Richardson, 1 Burrows, 517-540; State vs. Love, 39 N. J. Law, 14; State vs. McGarry, 21 Wis., 496; State vs. Common Council, 9 Wis., 254; People vs. Thompson, 94 N. Y., 451.

The rule is also clearly stated in said decision that the sufficiency and reasonableness of the cause of removal are questions for the court. Dill. Mun. Corp., p. 255, and cases cited.

The court says this has been the settled law ever since Bagg's Case, supra, and we are not aware of any respectable authority to the contrary.

The statute authorizing the Secretary of the Interior to remove for good cause means sufficient cause and not merely any cause the Secretary may determine to be a good cause. Otherwise and as construed by appellee, it would have been wholly unnecessary for Congress to use the word "good" in the law. If the Secretary could determine a bad cause or insufficient cause or any cause to be a good cause. Congress would have stricken out the word "good" and inserted the word "any," but the use of the word "good" limits the power of removal to a sufficient legal cause and that must be determined or tried by the Secretay before he could find this fact. The officer must be notified of the specific charge and given a reasonable time to be heard. This charge according to the case of State vs. Council, 53 Minn., 242, must be a statement with specification of facts constituting a sufficient cause for removal sufficiently distinct to apprise the officer of the ground upon which the charges are based. Andrew vs.

King, 77 Me., 224; People vs. Thompson, supra, Dill. Mun. Corp., pp. 255.

Where the charter and ordinances empower the Mayor to remove an appointed officer for cause, no proceeding being specified, there exists an implied requirement of proper notice to the officer of charges preferred and full opportunity for him to be heard and the Mayor is clothed with the necessary power to carry out his authority. State vs. Walbridge, 119 Mo., 384.

Counsel for Plaintiff in Error are of the opinion that the demurrer in this case admits neither non-feasance nor malfeasance in office and that the record stands in legal effect as if there were no such suggestion in the record. The object to be attained by a pleading is to invoke the application of the law to the facts in a given case as the facts, and not conclusions of law, set out in the case. The purpose is to give the Court facts from which the Court can draw its own conclusions of law. The conclusion or opinion of the pleader is unimportant. If he does not set forth in his pleading material and relevant facts from which the Court can reach a legal conclusion there is nothing to which the law can find any application.

In this case no act or fact of either non-feasance or malfeasance is so pleaded that testimony could be admitted in a common law court in relation thereto. It therefore follows that the demurrer to the return of the Respondent admits neither non-feasance nor malfeasance in office.

In Marquez vs. Frisbie, 101 U. S., 473, it was said: "It is too obvious for comment that in all this the only use of the words fraud and fraudulent is to stigmatize acts which are adverse to the plaintiff's view of his own rights. But there is not a syllable which defines an act fraudulent in nature or done or performed under the influence of corrupt motives or by corrupt means."

Pleadings must state facts and not conclusions of law merely, and the allegation in this case that the loss arose from fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud the declaration is bad." Alabama vs. Burr, 115 U. S., 426.

A mere allegation of fraud in general terms, without stating the facts upon which the charge rests, is insufficient. Hazar vs. Griswalk, 21 F., 178.

"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading cannot make a case for the interference of a Court of Equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification." Ambler vs. Choteau, 107 U. S., 586, 591.

In the case of Bank vs. Buckner, 20 How., 108, 125, Mr. Justice Wayne in delivering the opinion of the Court said: "It was frequently urged in the argument by the counsel for the complainants, that the demurrer of the defendant was a confession of the frauds alleged in the bill, and that therefore the circuit court had jurisdiction to give relief.

"Our view of that demurrer is different. It is only a confession of all facts *well pleaded*, but in this bill none were so."

Aurora City vs. West, 7 Wall., 82.

Mr. Justice Field in the case of Dillon vs. Barnard, 21 Wall., 430, 437, said: "The averments of the bill as to the purport and meaning of the provisions of the indenture, the object of their insertion in the instrument, and the obligations they imposed upon the corporation and the trustees, and the rights they conferred upon the plaintiff when his

contract was approved, are not admitted by the demurrer. These are matters of legal inference, conclusions of law upon the construction of the indenture, and are open to contention, a copy of the instrument itself being annexed to the bill, and, therefore, before the court for inspection. A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."

Pennie vs. Reis, 132 U. S., 464-467.

In the case of United States vs. Van Auken, 96 U. S., 366-369, the Court said: "The demurrer admits only what is well pleaded."

In the case of Equitable Life Assurance Soc. vs. Brown, 213 U. S., 25, 43, Mr. Justice Peckham in delivering the opinion of the Court said: "We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill."

"A demurrer admits only facts, and facts well pleaded * * * The declaration is fatally defective for not stating facts necessary to enable the Court to judge for itself whether that conclusion of law has any foundation in fact."

Interstate Land Company vs. Maxwell Land Company, 139 U. S., 569, 577-8.

In the case of Fogg vs. Blair, 139 U. S., 118, 127, Mr. Justice Harlan in delivering the opinion of the Court said: "As he (appellant) impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging generally, that what was done was "colorable,' a 'fraud,' a 'breach of trust,' and a 'scheme' by which Blair and Taylor were to get the stock without paying for it." These are allegations of legal conclusions merely, which a demurrer does not admit.

"The matters alleged to be fraudulent are the steps taken to have the property forclosed and the purchase thereon ensuing, and what is charged is that the holders of large amounts of the bonds and of all the receiver's certificates combined to bring about the foreclosure and to make the purchase.

"Epithets do not make out fraud, and the averments are substantially of legal conclusions not admitted by the demurrers." Kent vs. Lake Superior Canal Co., 144 U. S., 75, 91.

To the same effect are Pullman's Palace Car Co. vs. Mo. Pac. R. Co., 115 U. S., 587; Mosher vs. St. L., etc., R. Co., 127 U. S., 390.

"Conclusions drawn from facts alleged in a pleading are not admitted by demurrer." U. S. vs. Des Moines Nav. R. Co., 142 U. S., 510.

"Mere averments of a legal conclusion are not admitted by a demurrer, unless the facts set forth sustain the allegations." Gould vs. Evansville, etc., R. R. Co., 91 U. S., 526.

"An allegation that a partnership directed one of its members to give a bond in the name of the partnership, is not admitted by demurrer." U. S. vs. Ames, 99 U. S., 35.

"An averment that bonds issued by a town were executed pursuant to the laws of the state, is a conclusion of law not admitted by a demurrer; and the declaration is fatally defective for not stating the facts necessary to determine whether that conclusion of law has any foundation in fact." Hopper vs. Covington, 118 U. S., 148.

It seems clear that there is no more reason from this record to assume non-feasance or malfeasance on the part of the Relator than on the part of the Respondent.

It therefore appears that under the circumstances of this particular case charges should have been preferred, notice given and time of hearing fixed, and opportunity had for the appellant to have been heard in his defense prior to the order of January 2, 1913. It is inconceivable that the course pursued by the Secretary of the Interior in this case is in accord with the law as laid down in the authorities cited.

It is also apparent that the court committed error in holding that the Secretary of the Interior had authority of law to pass the arbitrary order of removal. The said arbitrary act of the Respondent was set out in the petition and admitted by the answer and it is apparent that said act was performed wholly without consideration of the rights of the relator in the premises.

It therefore follows that the Court committed error in overruling the demurrer of the appellant Alpheus H. Brown to the answer and return of the Respondent to the rule to show cause; and that the Court also committed error in discharging said rule; and in dismissing the petition of the

appellant for the reasons set forth in the argument in the first and second assignments of error.

It is respectfully submitted that the application for the allowance of a writ of error to the Court of Appeals of the District of Columbia be granted.

Respectfully submitted,

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